



Federal Communications Commission
Washington, D.C. 20554

July 12, 2005

DA 05-1967
In Reply Refer to:
1800B3-CNZ

Hoosier Broadcasting Corporation
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Living Proof, Inc.
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In Re: NEW (NCE FM), North Judson, IN
Facility ID No. 122012
BNPED-19991214AAL

NEW (NCE FM), Oakford, IN
Facility ID No. 122129
BNPED-19991214ACF

Applications for NCE FM Construction Permits

Group No. 990610

Dear Counsel:

We have before us Group 990610 – two mutually exclusive applications for permits to construct new noncommercial educational (“NCE”) FM stations serving different communities. In such situations, the rules require the Commission to make a threshold determination as to whether grant of any of the applications would further the fair, efficient, and equitable distribution of radio service among communities.¹ For the reasons below, we determine that Living Proof, Inc. (“Living Proof”) is entitled to a decisive Section 307(b) preference.

An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide a first or second reserved channel NCE aural service (in the aggregate) to at least ten percent of the population, provided that this constitutes at least 2,000 people, within the proposed station’s 60 dBu contour.² If

¹ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

² See 47 C.F.R. § 73.7002(b). With respect to population information, applicants were to use the 2000 Census data, if available by June 4, 2001. See “Supplements and Settlements to Pending Closed Groups of Noncommercial

more than one applicant in a mutually exclusive group qualifies for a preference, we compare first service population coverage totals.³ An applicant will receive a dispositive fair distribution preference by proposing to serve at least 5,000 more potential listeners than the next highest applicant's first service total.⁴ If no applicant is entitled to a first service preference, we will consider combined first and second service population totals and apply the same 5,000 listener threshold.

In the present group, Living Proof would serve North Judson, Indiana and Hoosier Broadcasting Corporation ("HBC") would serve Oakford, Indiana. Each applicant claims that it would provide a new first or second NCE service to 10 percent of the population, and to at least 2,000 people, within its respective service area, and therefore, that it is eligible for a fair distribution preference.⁵ Both Living Proof and HBC assert that they are entitled to a first service preference.⁶ However, based on the applicants' submissions and calculations, neither applicant will provide new first service to 5,000 more people than the other applicant. Next, we consider whether Living Proof or HBC would provide combined first and second service to 5,000 more persons than the next best applicant. Living Proof claims to provide a first or second service to 100,058 people (52,238 first service plus 47,820 second service). HBC claims to provide a first or second service to 80,571 people (47,978 first service plus 32,593 second service). Accordingly, pursuant to Section 73.7004 of the Commission's rules, we identify Living Proof as the tentative selectee. Group 990610 thus will not proceed to a point hearing.⁷

Accordingly, it is ordered that the application of Living Proof, Inc. is accepted for filing. It is also ordered that Living Proof, Inc. is TENTATIVELY SELECTED to be awarded a construction permit (File No. BNPED-19991214AAL) for a new NCE FM station in North Judson, Indiana. Petitions to deny

Educational Broadcast Applications Due by June 4, 2001," *Public Notice*, 16 FCC Rcd 6893 (MB Mar. 22, 2001). Applicants were also to base their "fair distribution" analysis on the "snap shot" date of June 4, 2001, which is applicable unless the applicant subsequently makes engineering changes that would diminish its comparative position. *Id.* In this case, neither of the applicants has made such engineering changes. In addition, each applicant timely supplemented its application with a Section 307(b) showing; each purports to be based on 2000 Census data and a "snap shot" date of June 4, 2001.

³ See 47 C.F.R. § 73.7002(b). See also "Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001," *Public Notice*, 16 FCC Rcd 10892, 10893 (MB May 24, 2001).

⁴ *Id.*

⁵ Living Proof's 60 dBu contour encompasses 100,058 people. HBC's 60 dBu contour encompasses 80,571 people.

⁶ Living Proof claims to provide 52,238 people with new first service. HBC claims to provide 47,978 people with new first service.

⁷ See 47 C.F.R. § 73.7002(b). The Media Bureau has delegated authority to make 307(b) determinations in NCE cases. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *partially reversed on other grounds*, *NPR v. FCC*, 254 F.3d 226 (DC Cir. 2001) ("NCE Order"). See also 47 C.F.R. § 0.283. In the *NCE Order*, the Commission concluded that "[i]n examining the fair distribution issues, we will use the general process set forth in the Section of our Competitive Bidding proceeding that addressed Section 307(b) considerations for AM stations." See *NCE Order*, 15 FCC Rcd at 7397 (citing *Comparative Bidding for Commercial Broadcasting and Instructional Television Fixed Services*, 13 FCC Rcd 15920 (1998) (delegating authority to the staff to conduct Section 307(b) analyses with respect to AM applications prior to conducting auctions of competing applications)). In contrast, the *NCE Order* noted that the point system analysis conducted when Section 307(b) is not determinative is considered a simplified "hearing" for purposes of 47 U.S.C. § 155(c)(1). See *NCE Order*, 15 FCC Rcd at 7420.

the tentative selectee are due within thirty (30) days following the issuance of a subsequently issued public notice announcing the tentative selection of this application.⁸

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁸ See 47 C.F.R. § 73.7004. If any applicant previously raised issues against the tentative selectee, it must refile its objections within this thirty (30) day period.